LIBRARY
SUPREME COURT, U. S.

FILED
JUL 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2052

W. KENNETH POPE, ET UX,
Petitioners,

v.

THE STATE OF TEXAS, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL
DISTRICT OF THE STATE OF TEXAS

ROBERT L. BURNS
Suite 823,
2 Houston Center
Houston, Texas 77002
Counsel for Petitioners

Of Counsel:

SEARS AND BURNS
Suite 823,
2 Houston Center
Houston, Texas 77002

FIDELITY PRINTING COMPANY, HOUSTON

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	
Summary	4
The Condemnation Proceeding	4
Hearing on Motion for New Trial	6
Preservation of Errors	9
The Appeal	9
Reasons for Granting the Writ	11
1. The Public Importance of the Issues Presented	11
2. The Decision Below Conflicts in Principle with Brady v. Maryland, etc.	16
Conclusion	17
Certificate of Service	17
Appendix	
A. Texas Revised Statutes	A-1
B. Judgments, Opinions and Orders	A-4
C. Record of Preservation of Error	A-13

AUTHORITIES

Federal Cases

Almota Farmers Elevator & Whse. Co. v. *United States*, 93 S.Ct. 791	11
Barnhart v. *Brinegar*, 362 F.Supp. 464	13
Brady v. *State of Maryland*, 373 U.S. 83	16
Chicago, B & Q R.R. v. *City of Chicago*, 166 U.S. 226	11
Gigilio v. *United States*, 405 U.S. 150	16
Harney v. *United States*, 306 F.2d 523	13
Interstate Circuit, Inc. v. *City of Dallas*, 390 U.S. 672	2

PAGE

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 2
Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 326 11
United States v. *229.34 Acres of Land*, 246 F.Supp. 718 13
United States v. *Fuller*, 93 S.Ct. 801, 803 11

State Cases

Boyles v. *Houston Lighting & Power Co.*, 464 S.W.2d 359 9
City of Houston v. *Autrey*, 351 S.W.2d 948 9
City of Houston v. *Derby*, 215 S.W.2d 690 12
Crist v. *Iowa State Highway Commission*, 123 N.W.2d 434 15
Dallas Railway & Terminal Co. v. *Oehler*, 296 S.W.2d 757 9
Hanlon, Ex Parte, 406 S.W.2d 204 9
Hodges v. *State*, 403 S.W.2d 207 9
Ladon, Ex Parte, 325 S.W.2d 121 9
Lapsley v. *State*, 405 S.W.2d 406 9
Rogers, In re, 220 N.W. 808 12
Shell v. *State Road Department*, 135 So.2d 857, 861 15
Shirley v. *Dalby*, 384 S.W.2d 362 9
State v. *Ashworth*, 484 S.W.2d 565 9
State v. *Biggers*, 360 S.W.2d 516 9
State v. *Jackson*, 388 S.W.2d 924 ..... 5, 13

Federal Constitution

Fifth Amendment 3, 11, 13
Fourteenth Amendment 2, 3, 6, 10, 13, 16

Federal Statutes

23 U.S.C. § 101 14
28 U.S.C. § 1257(3) 2
42 U.S.C. § 4651 13
Federal Aid Highway Act of 1968, 82 Stat. 820 (P.L. 90-495, § 35) 14
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1904, 42 U.S.C. § 4651, 4655 14

PAGE

Texas Constitution

Article 1, Section 17 3

Texas Statutes

Article 3264 3

Article 3265 3

Article 3266 ..... 3, 12

Article 3268 3

Miscellaneous

5 Nichols, *The Law of Eminent Domain*, (3rd Ed.) C.H. XXIII-a 14

6 Nichols, *The Law of Eminent Domain*, (3rd Ed.) p. 82, § 24.62[1] 12

6 Nichols, *The Law of Eminent Domain*, p. 81, § 24.62 12

Rohan, *The Condemnor's Duty to Pay its Full Appraisal* 14

Slavitt, *More Inequities and Injustices of Condemnation Acquisitions*, 43 Conn. B.J., Vol. 43, No. 1, March, 1960 15

Slavitt, *Inequities and Injustices of Condemnation Acquisitions*, 40 Conn. B.J. 11 15

Varney, *The Use of Prior Appraisals in Condemnation Cases*, 1968 Report Committee on Condemnation and Condemnation Procedures, A.B.A., p. 377 15

U. S. Congressional & Administrative News, 1970, p. 5871 14

New York Eminent Domain Procedure Act 15

29 C.J.S. 997, *Eminent Domain*, § 224(1) 12

29 C.J.S. p. 998-1001, *Eminent Domain*, § 224(1) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

W. KENNETH POPE, ET UX,
Petitioners,

v.

THE STATE OF TEXAS, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL
DISTRICT OF THE STATE OF TEXAS

Petitioners W. KENNETH POPE and wife, KATE S. POPE pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of the State of Texas rendered in this case on October 17, 1973.

OPINION BELOW

The unreported opinion of the Court of Civil Appeals appears in Appendix, p. 4. No opinion was rendered by the Supreme Court of Texas.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on October 17, 1973, Appendix, p. 10, and the Popes' Motion for Rehearing was overruled on November 7, 1973, Ap-

pendix, p. 11. On March 6, 1974 the Supreme Court of Texas denied the Popes' Application for Writ of Error to the Court of Civil Appeals with the notation "Refused. No Reversible Error", and on April 24, 1974 overruled the Motion for Rehearing on the Application for Writ of Error, Appendix, p. 12. The Application and each Motion were timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Since the Supreme Court of Texas denied the Application for Writ of Error, certiorari is properly directed to the Court of Civil Appeals as "the highest court of a state in which a decision could be had". 28 U.S.C. § 1257(3); *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U.S. 672 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954). Judgment was not final until the order entered on April 24, 1974 denying Motion for Rehearing on Application for Writ of Error.

QUESTIONS PRESENTED

The State of Texas contracted for the County of Harris to acquire right of way, including the Popes' land, for a federal highway. The State determined the market value of the Popes' land to be $146,800 and the County offered and the Popes refused this sum. At the trial the County did not present evidence of the approved market value but presented testimony of an appraiser, whom the State refused to employ, of a market value of $75,000 (51% of the approved value).

1. Was the suppression or non-disclosure by the State of Texas (through the County) at the trial of evidence of the State-approved market value and the presentation of the market value opinion of $75,000 a denial of due process of law under the Fourteenth Amendment to the Popes?

2. Does the mandate of the Fifth Amendment that private property shall not be taken for public use without just compensation, as adopted by the due process clause of the Fourteenth Amendment, require a State in the trial of a condemnation suit to present evidence of the price it has determined to be the market value of the property being taken?

3. When the laws of a State compel a condemning agency, as a condition precedent to vesting jurisdiction of a condemnation proceeding in a court, to offer the owner of land to be acquired the price determined by the agency to be market value, is it a denial of due process of law for such agency, after vesting jurisdiction in the Court by making the required offer, to suppress evidence of such price and present evidence that the market value is fifty-one percent of its determined market value?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

Constitution of the United States, Amendment V:

> ". . . Nor shall private property be taken for public use, without just compensation . . ."

Article 1, Section 17, Texas State Constitution:

> "No person's property shall be taken . . . for or applied to public use without adequate compensation being made . . ."

Portions of Articles 3264, 3265, 3266 and 3268, Revised Statutes of Texas, 1925, as amended, explain condemnation

procedure in Texas and for this purpose are included in the Appendix, p. 1-3:

STATEMENT OF THE CASE

Summary

W. Kenneth Pope and wife, Kate S. Pope, owned a tract of land situated in the southwest quadrant of the City of Houston, Harris County, Texas. The State of Texas, through the Texas Highway Department (Department), determined the necessity to acquire 4.21 acres of the Pope land as right of way for the Southwest Freeway (U.S. Highway 59). The Department and the County of Harris (County) executed a contract providing for the County to acquire the right of way, for the State to reimburse the County for part of the acquisition costs, and for the State to determine the value of properties to be acquired. (N.27-30, DX. 4)[1]

The State determined the market value of the Popes' property to be $146,800 and the County offered and the Popes rejected this sum. Condemnation special commissioners returned an award of $165,134.70. The Popes appealed to court, the County presented evidence by an appraiser that the State refused to employ that the property had a market value of $75,000 (51% of the approved market value), the witness for the Popes testified to a value of $220,000, and the jury returned a verdict of $155,960. Judgment rendered on the verdict was affirmed by appellate courts of Texas.

The Condemnation Proceeding

On December 9, 1958, the Chief of the Right of Way Department of the County offered the Popes the sum of

[1] The record consists of a transcript of filed documents (T), transcript of trial testimony (R), transcript of testimony at the hearing on motion for new trial (N) and documentary evidence of the State (PX) and the Popes (DX).

$146,800 for their 4.21 acres of land (DX. 7). The offer was declined, and in accordance with Texas condemnation procedure the State and County filed a petition in condemnation with the judge of the County Civil Court at Law No. 1 of Harris County, (T. 3). Article 3264. Appendix, p. 1. The judge appointed special commissioners who held a hearing and awarded the Popes the sum of $165,134.70 as the market value of the property on January 30, 1959, (T. 8).

The Popes filed objections with the judge and the proceeding became a civil case in the County Court at Law, (T. 13). Article 3266 Appendix, p. 2. On March 6 the County deposited the sum of $165,134.70 in the registry of the Court to obtain the right to take possession of the land and this became the date of taking. Article 3268, Appendix, p. 3. Thereafter the Popes withdrew this sum, (T. 37). The acceptance of the money eliminated all issues except the market value of the tract taken and damages to the remainder. *State* v. *Jackson,* 388 S.W.2d 924 (Tex. Sup. 1965).

Trial was delayed by extended title litigation, but the case was called for trial before a jury on March 20, 1972, and by motion the Popes admitted that the sole issue in the cause was the market value of the part taken (T. 16). Having the right to open and close the evidence, the Popes presented the testimony of V. P. Ringer, an independent fee appraiser, that the market value of the property was $220,180.11, (R. 23).

Mr. Ringer had been in the real estate business since 1928 and had engaged in real estate mortgage loans, brokerage, property management and appraising. Mr. Ringer was a member of the Houston, State and National Board of Realtors, Society of Real Estate Appraisers, Society of Real Estate Counsellors and American Institute of Real

Estate Appraisers and held from these organizations the designations of Senior Real Estate Analyst, C.R.E. and Member of the Appraisal Institute. His past offices included Chairman of the Texas Real Estate Commission (State agency regulating real estate brokers), member of the Planning Commission of the City of Houston, President of the Houston Board of Realtors, President of the local chapter of the American Institute of Real Estate Appraisers and President of the local chapter of the Society of Real Estate Appraisers. He currently was a member of the Governing Council of the American Institute of Real Estate Appraisers. (R. 5-19).

After the Popes rested the State presented the testimony of Mr. H. F. Finley that the market value of the Pope land was $75,000 (51% of the approved value and offer of $146,800), (R. 329). No other witnesses were presented.

The jury found that the market value of the tract on March 6, 1959 was $155,960 (T. 35), the trial court rendered judgment awarding the State the amount by which the award of the Special Commissioners exceeded the verdict ($9,174.70). (T. 37-42). The Popes filed and trial court overruled a Motion for New Trial (T. 79).

Hearing on Motion for New Trial

By assignment of error in their Motion for New Trial the Popes assailed the verdict and judgment on the ground that the procedure employed of suppressing evidence of the approved market value and presenting an opinion of $75,000 deprived them of due process of law in violation of the Fourteenth Amendment to the Federal Constitution. (T. 52). Appendix, p. 13.

The following facts were presented at the hearing on the Pope's Motion for New Trial by William L. McClure,

Urban Administrative Engineer of the Houston District of the Texas Highway Department, E. E. Schwenke, Chief of the Right of Way Department of Harris County, and the Assistant County Attorney handling this suit.

On September 26, 1957 and August 5, 1958 the Department and the County contracted for the County to acquire right of way for the Southwest Freeway (U. S. Highway 59) in the City of Houston, for the State to reimburse the County for part of the acquisition costs, and for the State to determine the values of properties to be acquired. (N. 27-30, DX. 4). The contract was made in accordance with the Right of Way Manual of the Department, (DX. 3). The Manual provides for a determination of an approved market value of properties to be acquired, and for that purpose provides the procedure for employing appraisers, the contents of appraisal reports, and the method of review of appraisal reports by a District and the State Right of Way Engineer. (DX. 3, N. 27-30).

In accordance with the Manual the Houston District appointed Robert Winstead and Thomas H. Bearden to appraise the Pope property. (N. 9, 10, 67). Winstead rendered a market value opinion of $128,450 and Bearden one of $146,800. (DX. 1). After review of the appraisal reports the Houston District approved the Bearden report and opinion and sent the appraisal reports of each to the Right of Way Division of the Department in Austin (the capital) which reviewed the appraisal reports and approved the recommendation of the District of an approved market value of $146,800. (N. 10-13, 48).

The District transmitted the "recommended compensation" of $146,800 and the appraisal report of Bearden to the County with the advice that Bearden was the "selected appraiser". (DX 2, 8). The Chief of the County Right of

Way Department requested authority to offer $146,800 to the Popes and to bring a condemnation proceeding if this price was not accepted. (DX. 7). The Commissioners Court (governing body of the County) approved this request. As noted above, an offer of $146,800 was made and refused.

At a time not established in the record, by letter the County asked the District to employ Mr. H. F. Finley to appraise the Pope land. The State refused. (N. 26, 27, 47). On February 26, 1959, about six months after receiving the State approved market value and 44 days after filing of this proceeding, however, the County employed Finley to appraise the Pope land. (N. 72).

(At the trial the State did not call Bearden or Winstead as a witness or present evidence of the State approved market value of $146,800. Finley was the only witness called by the State.)

The decision to present Finley as a witness and to not present other witnesses or evidence of the State approved market value was made by the Assistant County Attorney who tried the case. (N. 70-72). He testified that the Pope case was assigned to him in the latter part of 1970, that the case was set for trial (not the setting at which the case was tried), and that on December 21, 1970 (more than one year before the trial in March, 1972) he talked to Bearden by telephone and "found that Mr. Bearden was not available to testify". (N. 70-73). The Assistant County Attorney did not call Bearden or Winstead to testify at the hearing.

There is no evidence that Bearden was not available to testify in March, 1972. At the hearing Mr. Schwenke testified that he knew Mr. Bearden and thought that he was still engaged in the appraisal business in March of

1972. (N. 66, 67). The file in the District showed that Winstead and Bearden appraised the Pope property for the State and the file was available for review by anyone from the County. (N. 47, 48). The Assistant County Attorney did not examine the District file. He talked to McClure by telephone concerning the Pope property but did not ask whether the State had the property appraised by other appraisers. (N. 74, 75).

Preservation of Errors

There is no evidence that prior to or during the trial the Popes knew of the Bearden appraisal, his opinion, or the approved market value. Prior to the trial the Popes could not have obtained by discovery or otherwise the names of the State appraisers, the State-approved-value or the reports of appraisers, and could not have obtained any of this information during the trial.[2] If the Popes had learned the identity of a State appraiser, they could have called him as their witness but could not have disclosed his employment by the State. *State* v. *Biggers,* 360 S.W. 2d 516 (Tex. Sup. 1962).

The Appeal

The Popes duly perfected an appeal to the Court of Civil Appeals from the judgment and order overruling

---

[2] *Boyles* v. *Houston Lighting & Power Co.*, 464 S.W.2d 359, (Tex. Sup. 1971); *Ex Parte Hanlon,* 406 S.W.2d 204 (Tex. Sup. 1966); *Ex Parte Ladon,* 325 S.W.2d 121 (Tex. Sup. 1959); *Dallas Railway & Terminal Co.* v. *Oehler,* 296 S.W.2d 757 (Tex. Sup. 1957); *State* v. *Ashworth,* 484 S.W.2d 565 (Tex. Sup. 1972); *Shirley* v. *Dalby,* 384 S.W.2d 362 (Tex. Civ. App. 1964, writ ref., n.r.e.); *City of Houston* v. *Autrey,* 351 S.W.2d 948 (Tex. Civ. App. 1961, writ ref., n.r.e.); *Hodges* v. *State,* 403 S.W.2d 207 (Tex. Civ. App. 1966, writ ref., n.r.e.); *Lapsley* v. *State,* 405 S.W.2d 406 (Tex. Civ. App. 1966, writ ref., n.r.e.).

their Motion for New Trial. Point of Error No. One in their Brief in that Court asserted that the verdict and judgment were obtained by fraud and in violation of the Fourteenth Amendment because of the suppression of the approved market value of $146,800 and presentation of the opinion of $75,000. Appendix, p. 16.

While recognizing that the appraisal by which the State determined the approved market value was relevant to the offer that would be made in negotiating for purchase, the Court of Civil Appeals held that it was not a suppression of evidence at the trial to fail to call such appraiser and that it was not a denial of due process for the State to fail to present evidence of its approved value or to call as a witness the appraiser whose opinion was adopted as the approved value. In Grounds One, Two, Three, Four and Six of the Pope's Motion for Rehearing the holding of the Court of Civil Appeals was attacked as depriving the Popes of due process of law in violation of the Fourteenth Amendment. Appendix, p. 16.

The Court of Civil Appeals overruled the Motion for Rehearing, Appendix, p. 11, and in Points One, Two, Three, Four and Six of their Application for Writ of Error to the Supreme Court of Texas the Popes asserted the denial of due process of law from the procedure employed in suppressing evidence and presenting the opinion of Finley. Appendix, p. 18. The Application was overruled, Appendix, p. 12, and the same assignments of error were presented in the Pope's Motion for Rehearing, which was also overruled. Appendix, p. 21.

REASONS FOR GRANTING THE WRIT

1. The Public Importance of the Issues Presented

The Due Process Clause incorporates the Fifth Amendment and imposes upon the States the obligation to pay just compensation for the taking of private property. *Chicago, B & Q.R.R.* v. *City of Chicago,* 166 U.S. 226 (1897). "Just compensation" means the full and perfect equivalent in money of the property taken. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326 (1893). This Court early established the concept of "market value" as the equivalent. The owner is entitled to the market value of his property at the time of the taking. *Almota Farmers Elevator & Whse. Co.* v. *United States,* 93 Sup. Ct. 791, 794 (1973). The word "just" in the Fifth Amendment evokes ideas of "fairness" and "equity". *United States* v. *Fuller,* 93 Sup. Ct. 801, 803 (1973). Due process is FAIR PLAY. The issue presented by the holding of the Court of Civil Appeals is whether when a State becomes a litigant in eminent domain, fair play requires it to subordinate that role to its duty as a government to a citizen, or leaves it free to pursue a "win at any cost" attitude.

While recognizing that the price determined by the State of Texas to be the market value of the Pope property was relevant to the duty of the State to negotiate in good faith with the Popes prior to condemnation, the Court of Civil Appeals held that it was not a taking of property without due process of law for the State to suppress evidence of its approved market value and to present evidence of a price equal to 51% of the approved value (by a witness whom the State refused to employ).

The question of the scope of the duty of the State of Texas in the trial of a condemnation proceeding is applicable to the United States and the other 49 states and is

a substantial federal question which has not heretofore been determined by this Court.

The laws of a majority of the states (including Texas) require a bona fide effort to purchase as a condition to filing condemnation proceedings and require that the effort to buy be in good faith. 6 Nichols, The Law of Eminent Domain (3rd Ed.) p. 82, § 24.62 [1]; 29 C.J.S. p. 998-1001, Eminent Domain, § 224, (1); *City of Houston* v. *Derby,* 215 S.W.2d 690 (Tex.Civ.App. 1948, writ ref'd). While there has been little discussion on the question, it has been held that a bona fide effort to purchase involves a willingness to pay the market value of the land. *In re Rogers,* 220 N.W. 808 (Mich. Sup. 1928). In the absence of such a requirement by a constitution or statute, it is held that an attempt to purchase is not a condition precedent to the commencement of a condemnation proceeding. 6 Nichols, The Law of Eminent Domain, p. 81, § 24.62; 29 C.J.S. 997, Eminent Domain, § 224(1).

In the large number of states requiring an offer to pay the price determined to be the market value of land to be taken as a condition to vesting jurisdiction in the hearing agency, is it consistent with due process and the obligation to pay just compensation for such a state to offer its approved market value and then as a litigant suppress evidence thereof and present evidence of a much lower value? And in a state where there is no requirement of negotiation, does such a state have the right at the trial to suppress its determined market value in an effort to procure the land for less than its reasonable value? This federal question has not been decided by this Court, and no direct holding thereon by any court has been found.

An additional problem is presented in Texas and other states having similar condemnation procedure. Art. 3266,

Tex. Rev. Stat. 1925 authorizes a condemning agency to take possession of the land sought upon depositing a sum equal to the award of Special Commissioners into the registry of the court. Withdrawal of the sum by the owner eliminates the issue of good faith effort to agree and all other issues except the amount of compensation. *State* v. *Jackson,* 388 S.W.2d 924 (Tex. Sup. 1965). If the deposit is not withdrawn the condemning agency has the burden of proof on every issue except compensation. In such a case the condemnor will have to introduce evidence of its approved market value to establish a good faith effort to purchase. Unless the Fourteenth and Fifth Amendments prevent suppression of the approved market value, if the owner has withdrawn the money, the condemning agency may select its own price to place in the evidence, as it did in the instant suit.

The few cases even touching the area of the issues presented here emphasize the need for decision from this Court. In regard to an offer to purchase, it has been said that the Fifth Amendment does not "prevent the United States from making an advantageous bargain with a landowner provided, of course, that it does so in a fair, honest and aboveboard transaction". *Harney* v. *United States,* 306 F.2d 523 (C.A. 1 1962) cert. den. 371 U.S. 911 (1962); *United States* v. *229.34 Acres of Land,* 246 F.Supp. 718 (D. C. Ind. 1965). It is difficult to conceive how, in a fair, honest and above-board transaction with a landowner, the United States can make *an advantageous bargain.* A claim that a failure to negotiate in compliance with 42 U.S.C. § 4651 violated the Fifth and Fourteenth Amendments has been characterized as "frivolous" because due process does not extend to such negotiation procedures but only affords notice and hearing. *Barnhart* v. *Brinegar,* 362 F.Supp. 464 (W.D. Mo. 1973). Does due process extend to presentation of evidence in court?

The Congress has also approached but not touched the issue of the duty of government in court in a condemnation proceeding. The Federal-Aid Highway Act of 1968, 82 Stat. 820, (P.L 90-495, § 35), amended 23 U.S.C. § 101 to provide that before approving any project the Secretary must obtain from the State assurance that before initiating negotiations to purchase it would establish an amount believed to be just compensation and "make a prompt offer to acquire the property for the full amount so established". This Congressional interpretation of just compensation has been carried forward in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1904, 42 U.S.C. § 4651, § 4655. The House Report on the Act (U. S. Congressional & Administrative News, 1970, p. 5871) deplores policies of "take it or leave it" and acquisition of property at an amount below its approved appraisal practised by Federal agencies. The Report equates the requirement of an offer of an agency's approved value to due process of law:

> "Any policy which does not entitle the property owner to an offer of the full amount of the agency's approved value estimate, where the owner must sell, is unfair. It is fundamental that all citizens should be dealt with fairly by their government."

The United States, the 50 states and their citizens whose property is taken need affirmation by this Court that all citizens will be dealt with fairly by their governments in court.

In deploring negotiation practices of some governments to buy as cheaply as possible and discovery procedures immunizing government appraisal reports, the commentators have also approached the problem of the duty of government in court. 5 Nichols, The Law of Eminent Domain, (3rd Ed.) C.H. XXIII-a, Rohan, *The Condemnor's*

Duty to Pay its Full Appraisal; Slavitt, *Inequities and Injustices of Condemnation Acquisitions,* 40 Conn. B.J. 11 (1966); Slavitt, *More Inequities and Injustices of Condemnation Acquisitions,* 43 Conn. B.J., Vol. 43, No. 1 March, 1960; Varney, *The Use of Prior Appraisals in Condemnation Cases,* 1968 Report, Committee on Condemnation and Condemnation Procedure, A.B.A., p. 377.

Section 303 of the Eminent Domain Procedure Act recommended by the State Commission on Eminent Domain of New York requires a condemnor to establish an amount believed to be just compensation and to make an offer for an amount not less than the highest estimation in the condemnor's appraisals and provides that "the condemnor's offer shall be admissible in evidence in any proceeding to determine just compensation". 1972 Report of Committee on Condemnation and Condemnation Procedure, A.B.A., p. 256.

In a few decisions on the right of an owner to discover appraisal reports of the condemnor or to require testimony of its witness, the duty of government to be fair as a litigant has been emphasized. It is said that litigation between government and a citizen should not be a matter of "dog eat dog" or "win at any cost". *Shell* v. *State Road Department,* 135 So. 2nd 857, 861. (Fla. Sup. 1962); and it is no part of the duty of a state to a citizen "to attempt to procure his property for less than its reasonable value". *Crist* v. *Iowa State Highway Commission,* 123 N.W.2d 424, 431 (Ia. Sup. 1963).

No decision by this Court defining the duty of government, federal or state, as a litigant in a civil suit has been found. The plight of the Popes is not unique. The cries of the commentators demonstrate that the efforts of various governments to buy cheaply span the nation. The need for

this Court to speak on the duty of the government in court in a condemnation proceeding requires grant of certiorari to review the judgment below.

2. The Decision Below Conflicts in Principle with Brady v. Maryland, etc.

Brady v. *State of Maryland*, 373 U.S. 83 (1963) holds that suppression of evidence favorable to an accused, irrespective of the good faith or bad faith of the prosecution, violates the Due Process Clause. *Gigilio* v. *United States*, 405 U.S. 150 (1972) holds that non-disclosure by the prosecution of evidence material to an accused, whether "a result of negligence or design" is a violation of due process.

Perhaps the rights of an accused and the rights of a condemned owner are not identical, but in principle, the due process duty of government to deal fairly, honestly and aboveboard to a condemned is not less than that owed an accused.

"The United States wins its point whenever justice is done its citizens in the courts." This inscription on the wall of the Department of Justice, noted in *Brady*, does not describe the decision of the court below. The holding that the State of Texas owed no duty to disclose its approved market value in court and that its suppression of the same and presentation of a price equal to 51% thereof (by a witness the Department refused to employ), was not a taking of property without due process of law, squarely conflicts with the principles of *Brady* and *Gigilio*.

The need to settle, once and for all, that the duty of government, federal and state, to a citizen in court is one of fairness and openess, with no non-disclosure or suppression, asks for the grant of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas.

Respectfully submitted,

ROBERT L. BURNS
Suite 823,
2 Houston Center
Houston, Texas 77002
(713) 654-4454

Counsel for Petitioners

Of Counsel:

SEARS AND BURNS
Suite 823,
2 Houston Center
Houston, Texas 77002
(731) 654-4454

Certificate of Service

I hereby certify that on this 19th day of July, 1974, three copies of the Petition for Writ of Certiorari were delivered to Mr. Charles Wilson, at his office in the County Courthouse of Harris County, Houston, Texas 77002, counsel for the Respondent. I further certify that all parties required to be served have been served.

ROBERT L. BURNS
Suite 823,
2 Houston Center
Houston, Texas 77002
Counsel for Petitioners

APPENDIX

APPENDIX

A. Texas Revised Statutes

Article 3264.

The exercise of the right of eminent domain shall in all cases be governed by the following rules:

1. When real estate is desired for public use by the State or by a county, or a political subdivision of a county, or by a city or town, or by the United States Government, or by a corporation having the right of eminent domain, or by an irrigation district, water improvement district, or a water power control district created by authority of law, the party desiring to condemn the property after having failed to agree with the owner of the land on the amount of damages shall file a statement in writing with the county judge of the county in which the land or a part thereof is situated. It shall describe the land sought to be condemned, state the purpose for which it is intended to be used, the name of the owner, if known, and that the plaintiff and the owner have been unable to agree upon the value of the land or the damages. Where the land lies in two or more counties, in one of which the owner resides, the statement shall be filed in the county of the owner's residence.

2. When such statement is filed with the county judge, he shall, either in term time or vacation, appoint three disinterested freeholders of said county as special commissioners to assess said damages, giving preference to those that may be agreed upon between the parties.

3. The commissioners shall be sworn to assess said damages fairly and impartially and in accordance with law.

4. The commissioners shall promptly set a time and place for hearing the parties, and the day appointed shall be the

earliest practicable day, and the place selected shall be as near as practicable to the property in controversy or at the county seat of the county in which the property is situated.

5. Notice in writing shall be issued by the commissioners to each of the parties interested, notifying them of the time and place selected for the hearing.

• • • •

10. When service of notice has been perfected, the commissioners shall at the time and place appointed or at any other time and place to which the hearing may be adjourned, proceed to hear the parties.

Art. 3265.

1. The commissioners shall hear evidence as to the value of the property sought to be condemned and as to the damages which will be sustained by the owner, if any, by reason of such condemnation . . . .

2. When the whole of a tract or parcel of a person's real estate is condemned, the damages to which he shall be entitled shall be the market value of the property in the market where it is located at the time of the hearing.

• • • •

5. When the commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the county judge.

Art. 3266.

• • • •

6. If either party be dissatisfied with the decision, such party may within ten (10) days after the same has been

filed with the county judge file his objections thereto in writing, setting forth the grounds of his objection, and thereupon the adverse party shall be cited and the cause shall be tried and determined as in other civil causes in the county court.

• • • •

Art. 3268.

If the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:

1. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

• • • •

3. Should it be determined on final decision of the case that the right to condemn the property in question does not exist, the plaintiff shall surrender possession thereof, if it has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff.

• • • •

B. Judgments, Opinions and Orders

1. Court of Civil Appeals

No. 856

IN THE COURT OF CIVIL APPEALS

FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

W. KENNETH POPE, ET UX, APPELLANTS

v.

THE STATE OF TEXAS, APPELLEE

Appeal from County Civil Court at Law #1
of Harris County

In this condemnation case the appellees, State of Texas and County of Harris, condemned 4.2122 acres of land owned by appellants, W. Kenneth and Katie S. Pope, for the construction of the Southwest Freeway. The expense of acquiring the land for such project was to be shared by the State and County on a 50-50 basis, as long as the maximum did not exceed a state approved market value. The County was to bear the full amount of all costs exceeding the approved market value. The land was appraised by two State-appointed appraisers. One reported the market value to be $128,450, and the other, $146,800. The State accepted the higher figure as the approved value and so notified the County. The County negotiated with the owners for purchase of the property and offered to pay the entire amount of the approved value. The owners refused the offer and condemnation proceedings were instituted. The Special Commissioners awarded the Popes $165,134.70, based on a

March 6, 1959, date of taking. The appellants withdrew this award from the registry of the trial court, except for a small sum to cover taxes. which in effect waived any challenge to the propriety of the taking and left the proper valuation of the land as the sole issue.

In March of 1972 (the delay was due to a protracted trial in a trespass to try title action concerning the land) the case went to trial by jury, which found the market value to be $.85 per square foot or $155,960. The trial court accordingly found that the appellees were entitled to recover $8,393.44 plus interest from the appellants. That amount represented the excess of the amount that the appellants had withdrawn over the value found by the jury.

During the course of the trial each party presented the testimony of one expert witness. V. P. Ringer, who had appraised the property for the appellants, stated that in his opinion the market value was $1.20 per square foot or $220,108.11. H. F. Finley, who was employed and paid by the County, testified that in his opinion the market value was $.40 per square foot or $75,000.

Appellants claim that it was fraud and a violation of due process for the appellees to fail to present evidence of the two State-appointed appraisers and the approved market value. Admittedly, there is a duty on the State to negotiate in good faith with the landowner prior to condemnation. The record indicates that the State negotiated in good faith in this case. In fact, the approved maximum value established by the State and the amount offered by the County to the owners was the higher of the State's two appraisal figures. The appraisal by which a condemning authority determines the market value of property to be acquired is relevant to the offer that will be made in negotiating for an out-of-court acquisition. Public policy and the law re-

quire that the condemning authority exercise good faith in that negotiation. A rule requiring that when, as in this case, good faith negotiation has been admitted, the condemning authority must present to the jury evidence of the appraisal on the basis of which it negotiated would be calculated to fix a minimum which the jury would find to be the value of the property involved. For that reason the rule would discourage the good faith negotiation which public policy requires. Although the State must pay the fair market value, the determination of such must of necessity occur in an adversary proceeding. It is not a suppression of evidence to fail to call an appraiser. State v. Biggers, 360 S.W.2d 516 (Tex.Sup. 1962). It should be noted, however, that in this case the attorney for the County testified that one of the State's appraisers was unavailable and that he was unaware of the existence of the other. A prohibition against the landowner presenting evidence of the State's work product in arriving at an approved value is not a denial of due process. Lapsley v. State, 405 S.W. 2d 406 (Tex. Civ. App.-Texarkana 1966, writ ref'd n.r.e.). It follows that it is not fraudulent nor a denial of due process for the State to fail to present evidence of its approved value or to call as a witness its appraiser whose appraisal furnished the basis for such approved value.

Under the rule of State v. Oakley, 356 S.W.2d 909 (Tex. Sup. 1962), an appraiser may testify as to comparable sales, even though he does not have first-hand knowledge of such sales, if they had been confirmed by the appraiser. The court must instruct the jury not to consider this testimony as evidence that these sales actually did occur, but to consider it only in the process of evaluating the opinion of the appraiser-witness. In this case the two witnesses did testify concerning comparable sales of which they did not have first-hand knowledge, and the trial court properly instructed

the jury. The appellants filed a motion for new trial upon the ground, among others, that the jury was guilty of misconduct in that it had discussed the comparable sales and considered them as evidence of the value of the property taken by this proceeding. After hearing the testimony of two of the jurors on this subject the trial court overruled appellants' motion for new trial.

If the jury considered these comparable sales as evidence of the value of the property taken and harm resulted from such, the appellants would be entitled to a new trial because of jury misconduct. TEX.R.CIV. P. 327. By overruling the appellants' motion for new trial, the trial court impliedly found that there was no jury misconduct. When the testimony concerning such misconduct is conflicting, then the appellate court must accept the trial court's finding that there was no misconduct. Monkey Grip Rubber Co. v. Walton, 53 S.W.2d 770 (Tex. Comm'n App. 1932, opinion adopted). In this case the testimony concerning the alleged misconduct is conflicting. One juror testified that the instructions were read in the jury room and that he saw or heard nothing that might indicate that any of the jurors disregarded these instructions. Nevertheless, he later testified that the jury did discuss the various hearsay sales. Another juror testified that the sales were discussed, but in connection with evaluating the opinions of the two appraisers (which is a proper jury consideration). The trial court was entitled to believe that portion of the evidence which indicated that no misconduct occurred.

The appellants also contend that there was no evidence to support the jury's verdict as to the value of the property taken and that such was contrary to the overwhelming preponderance of the evidence. This position is untenable. Opinion testimony does no more than raise a fact question

for the trier of facts. See Broussard v. Moon, 431 S.W.2d 534 (Tex.Sup.1968). The fact that the jury's finding as to value did not coincide with the opinion of either of the two witnesses does not mean that the verdict had no support in or was against the weight of the evidence. It is the function of the jury to resolve conflicts in evidence and the verdict is supported by the evidence in this case.

Appellants' final point of error relates to the admission, over their objection, of evidence of the ownership of a tract of property designated as "Reserve A." The property taken from appellants was a tract of about four acres. It had about 280 feet of frontage on the east side of a street called Timmons Lane which runs north and south. Its depth was about 650 feet. It was not a corner tract and had no other street frontage than that on Timmons Lane. About a block north of appellants' property was another tract of similar size and shape which fronted on the west side of Timmons Lane. This tract was identified as "A-98." It too had no other frontage. However, between it and Norfolk Street, which runs east and west and crosses Timmons Lane, lay an irregular and narrow strip of land identified as "Reserve A." Reserve A was about 30 feet wide at the end where it fronted on Timmons Lane and less than 10 feet wide at the back end of A-98. Appellants' expert witness testified that the sale of A-98 was a comparable sale, noting that neither it nor appellants' property was a corner tract. On cross-examination the appellees were permitted to show that the purchaser of A-98 in the comparable sale had, two days earlier, also bought Reserve A. The two tracts combined formed a corner tract. The witness admitted that he knew of this situation but had not testified as to the sale of Reserve A because it was not comparable. This testimony of appellants' witness and a certified copy of the deed to Reserve A were admitted over appellants' objections.

The trial court did not err in admitting this evidence. The court on several occasions, including a written instruction in the charge, instructed the jury that hearsay evidence as to sales of other tracts was not admissible as evidence as to the facts of those sales, but only to show the basis of the expert witnesses' opinions. The evidence in question was relevant as to the comparability of the sale of A-98 and the corresponding weight to be given the opinion of appellants' expert witness which was based in part thereon.

The judgment of the trial court is affirmed.

/s/ Bert H. Tunks
Chief Justice

NO PUBLICATION — Rule 452.

Judgment rendered, and Opinion filed October 17, 1973.

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1973, present BERT H. TUNKS, Chief Justice, and Associate Justices EDWARD D. COULSON and CURTISS BROWN.

No. 856

In the cause

W. KENNETH POPE, ET UX

Appellants,

From ..... Harris County

Tr Ct # 93,317

Opinion by Tunks, CJ

THE STATE OF TEXAS

Appellee,

the following judgment was rendered October 17, 1973:

"This cause, being an appeal from the judgment rendered and entered by the court below on December 7, 1972, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellants, W. Kenneth Pope, et ux, Kate Pope, and their surety, United States Fidelity and Guaranty Company, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1973, present BERT H. TUNKS, Chief Justice, and Associate Justices EDWARD D. COULSON and CURTISS BROWN.

No. 856

In the cause

W. KENNETH POPE, ET UX

Appellants,

From ..... Harris County

Tr Ct # 93,317

Opinion by Tunks, CJ

THE STATE OF TEXAS

Appellee,

the following order was rendered November 7, 1973:

"It is ordered that appellants' motion for rehearing be overruled."

2. Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

March 6, 1974

B-4342.

W. KENNETH POPE ET UX.

v.

THE STATE OF TEXAS *et al.*

From HARRIS COUNTY, FOURTEENTH DISTRICT.

Application of petitioner's for writ of error to the Court of Civil Appals for the Fourteenth Suprme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, W. Kenneth Pope and wife, Kate Pope, and their surety, United States Fidelity and Guaranty Company, pay all costs incurred on this application.

April 24, 1974

No. B-4342.

W. KENNETH POPE ET UX.

v.

THE STATE OF TEXAS ET AL.

From HARRIS COUNTY, FOURTEENTH DISTRICT.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

C. Record of Preservation of Error

1. Popes Amended Motion for New Trial in Trial Court

31.

The verdict and judgment were obtained by and are the result of the fraud of the State and County and their employment of a procedure depriving Defendants of due process of law and denying them equal protection of the laws under both the State and Federal Constitutions. Article 1, Section 17, Texas Constitution, mandatorily requires the State of Texas and all of its agencies to pay adequate compensation (market value) for property taken under the power of eminent domain. The Fourteenth Amendment to the Federal Constitution and Article 1, Section 19, Texas Constitution, imposes the duty on the State and its agencies exercising eminent domain to adopt and pursue a procedure to determine and to pay adequate compensation in a manner that treats all property owners fairly and accords procedural due process. The State of Texas has adopted a detailed procedure for the purpose of assuring that adequate compensation is paid when eminent domain is exercised to acquire property for a highway, but this case was tried in defiance of rather than in compliance with such procedure.

This proceeding was brought in the name of the State of Texas by the County of Harris as a part of what is commonly called a 50-50 project under Article 6673e-1, V.A.C.S. In this type of project, the acquisition of land for a highway is handled by the County, but the State participates in the costs of land acquisition up to 50% thereof. Pursuant to the mandate of Article 1, Section 17, Texas Constitution, Article 6673e-1, V.A.C.S., requires the State and County to offer and pay market value for property acquired. This requirement is in addition to that of Article 3264, R.S.

1925, which, in requiring a bona fide effort to agree by offering to pay market value, implicitly requires payment of market value in accordance with the constitutional mandate.

Pursuant to the foregoing constitutional and statutory prescriptions, prior to initiation of this proceeding, the State Highway Department had adopted a Right of Way Manual promulgating rules and regulations to accord due process to owners of land sought for highway purposes and to prescribe procedures to insure that every effort was made to offer and pay such owners the market value of their property. The Manual requires that appraisals to determine market value of property be made, that either (1) the County recommend market value to the State Highway District Office, or (2) the District Office, on the basis of appraisals, determine and approve the market value of property to be acquired, and that the approved market value determined under either such procedure be reviewed for approval by the State Highway Right of Way Engineer in Austin.

This procedure was employed in determining the amount to be offered to Defendants. Under this procedure, the State and the County determined that the market value of Defendants' property taken was approximately One Hundred Forty Six Thousand Eight Hundred and no/100 ($146,800) Dollars, and this amount was offered to Defendants sometime during the year 1958.

Despite the State and County having determined as early as the year 1958, that the approved market value of Defendants' property was approximately $146,800, in the trial of this cause, without any change of the approved market value being made by the State Highway Department or the Commissioner's Court of Harris County, the County contended and presented opinion testimony that the market

value of Defendants' property was only Seventy Five Thousand and no/100 ($75,000) Dollars. This contention and evidence were presented despite the constitutional, statutory and Right of Way Manual duties of the State and County and despite the fact that the appraisal of the witness testifying to the figure of $75,000 was rejected when the approved value was adopted. The purpose of presenting such a ridiculously low figure was to induce the jury to reach a verdict in an amount much lower than the market value presented by Defendants.

This is evident by the argument made to the jury by Plaintiff that the jury was authorized to adopt any figure that was within the range of the opinions of the witnesses.

The testimony of market value of $75,000 was presented despite the fact that the approved market value of the State Highway Department was based in part on the appraisal of Mr. Thomas H. Bearden, a member of the American Institute of Real Estate Appraisers, determining that Defendants' property had a market value of $146,800 on July 15, 1958. At the time of this trial, Mr. Bearden was actively engaged in the appraisal business, with an office at 3633 Allen Parkway, Houston, Texas. Nevertheless, Mr. Bearden was not called as a witness by the State and County.

The foregoing shows deliberate pursuance of a procedure designed to prevent presentation of the approved market value of the State to the jury and to induce the jury to believe that Defendants had asked an inordinately high award. The verdict evidences the result. The jury in practical effect "split the differences". Due process requires that a judgment obtained through such unfair practices and procedure be set aside and a new trial granted.

2. Points of Error in Brief in Court of Civil Appeals

POINT ONE

(Assignment No. 31)

The verdict and judgment were obtained by fraud and in violation of the Fourteenth Amendment, U. S. Const., and Sections 17 and 19 of Article I, Texas Const. In accordance with the Fourteenth Amendment, the Constitution and laws of the State of Texas and the Right-of-Way Manual of the Texas Highway Department, the State determined the value of Defendants' 4.2122 acre tract of land to be $146,800. To make a bona fide effort to agree with Defendants on the market value of their land in compliance with the Constitutions, laws and Manual, the State offered Defendants its approved market value of $146,800. With the State having made this offer, Defendants admitted that the only issue before the Court was the market value of the land taken and by such admission eliminated the issue of a good faith effort being made by the State. Nevertheless, after Defendants had presented their evidence of its approved market value, but presented evidence that the market value of the land taken was $75,000. The procedure employed was a fraud on the Court and Defendants, was in violation of the Fourteenth Amendment, the Constitution and laws of the State of Texas and resulted in a verdict and judgment prejudicial to Defendants.

3. Grounds in Motion for Rehearing in Court of Civil Appeals

GROUND ONE

The Court erred in overruling Point One in the Brief for Appellants, reading as follows:

[Point One (above) was restated here]

GROUND TWO

The Court erred in holding that the mandate of the Fifth and Fourteenth Amendments, United States Constitution, and Sections 17 and 19, Texas Constitution, that no person's property shall be taken without payment of fair or adequate compensation was satisfied in the instant case by the State of Texas making a good faith effort with Defendants to negotiate to purchase their property before instituting proceedings to condemn the same.

GROUND THREE

The Court erred in holding that after the State of Texas had made a good faith effort to negotiate with Defendants to purchase their property, it had no duty under the Fifth and Fourteenth Amendments, United States Constitution, and Sections 17 and 19, Texas Constitution, to deal fairly with Defendants in the trial of the case by presenting evidence of the State approved market value of Defendants' property.

GROUND FOUR

The Court erred in holding that the act of the County, as agent for the State, in failing or refusing to present evidence at the trial of the approved market value of the State and that its conduct in presenting testimony of market value of Defendants' property in an amount equal to approximately 51% of the approved market value of the State by an appraiser who the State refused to employ was not a fraud on the Court and Defendants and was not a denial of due process to Defendants under the State and Federal Constitutions.

GROUND SIX

The Court erred in holding that it was not a suppression of evidence denying due process to Defendants for the State to fail and refuse to present evidence of its approved market value.

4. Points of Error in Application for Writ of Error

POINT ONE

The verdict and judgment were obtained by fraud and in violation of the Fifth Amendment and Due Process Clause of the Fourteenth Amendment, U. S. Constitution, and Section 17 and 19, Article I, Texas Constitution. In accordance with the Due Process Clause of the Fourteenth Amendment, Sections 17 and 19, Article I, Texas Constitution, the laws of the State of Texas and the Right of Way Manual of the Texas Highway Department, the State determined the market value of Petitioner's 4.2122 acre tract of land to be $146,800. To make a bona fide effort to agree with the Popes on the market value of their land in compliance with such constitutional provisions, laws and Manual, the State, through the County of Harris, offered the Popes the approved market value of $146,800. With this offer having been made, the Popes accepted the sum equal to the award of Special Commissioners deposited in Court and admitted that the only issue before the Court was the market value of the land taken and by such admission eliminated all other issues. Nevertheless, at the trial after the Popes had presented their evidence and rested, the State, through the County, did not disclose to the Court or the Popes, or present evidence of its approved market value, but, by an appraiser the State refused to approve, presented evidence that the market value of the land taken was $75,000. The Court of Civil Appeals erred in failing to hold that the procedure employed by the

County was a fraud on the Court and the Popes, was in violation of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, Sections 17 and 19, Article I, Texas Constitution, and the laws of the State of Texas and resulted in a verdict and judgment prejudicial to the Popes.

POINT TWO

The Court erred in holding that after the State (through the County) had made a good faith effort to negotiate with the Popes to purchase their property by offering the approved market value, the State had no duty under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, United States Constitution, and Sections 17 and 19, Article I, Texas Constitution, to deal fairly with the trial court and the Popes in the trial of the case by disclosing the State approved market value and presenting evidence thereof.

POINT THREE

The Court erred in holding that the conduct of the County, as agent for the State, in failing or refusing to disclose to the Court and the Popes and to present evidence at the trial of the State's approved market value of the Pope's land and its conduct in presenting testimony of market value in an amount equal to approximately 51% of the State approved market value by an appraiser who the State refused to employ was not a fraud on the Court and the Popes and was not a violation of the Fifth Amendment, U.S. Constitution, and was not a denial of Due Process under the Fourteenth Amendment and Section 19, Tex. Const.

POINT FOUR

The Court erred in holding that the conduct of the County, as agent for the State, in failing and refusing at

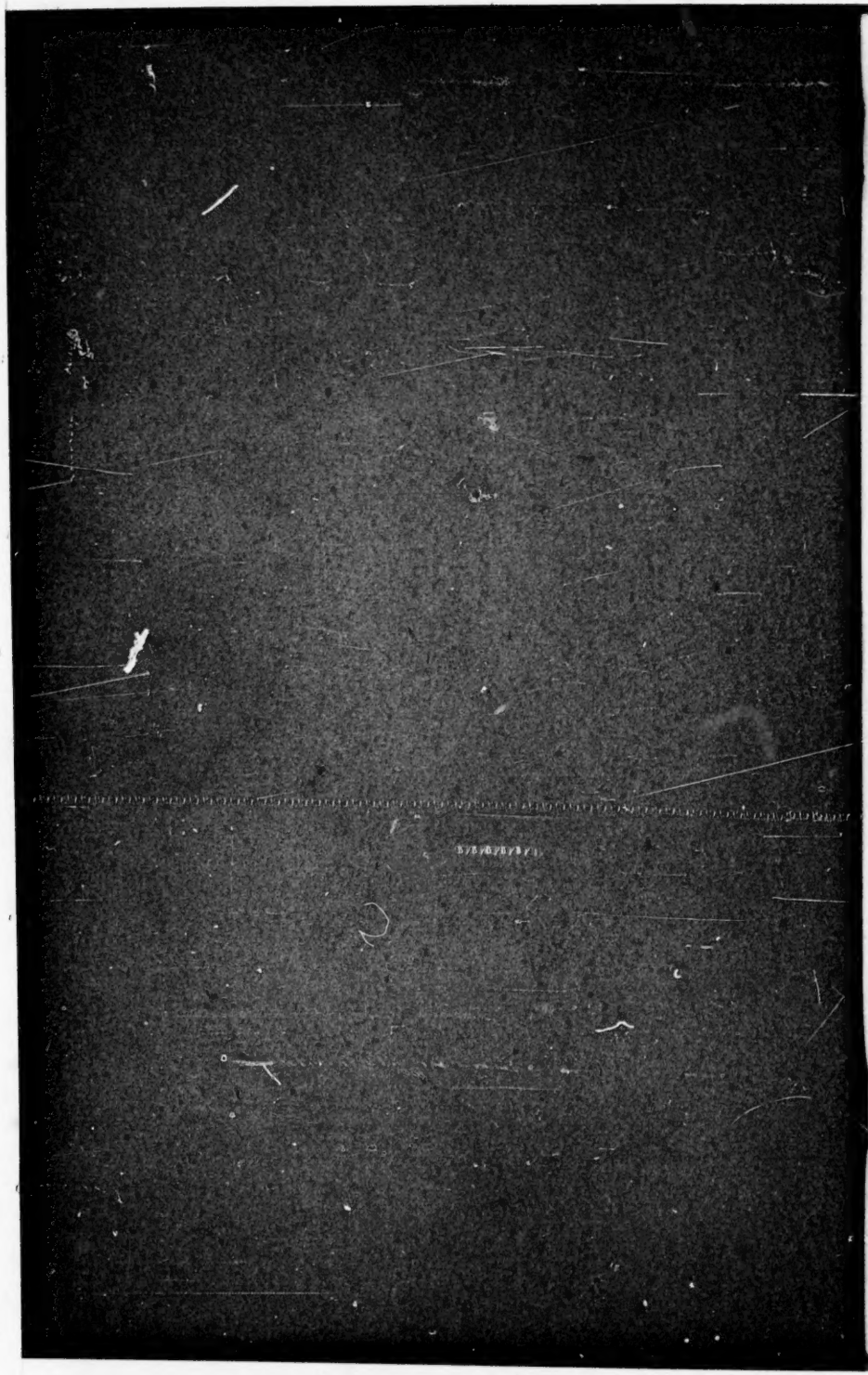
the trial to disclose to the Court and the Popes, and to present evidence of, the State approved market value was not a suppression of evidence denying due process of law to the Popes under the Fourteenth Amendment and Section 19, Texas Constitution.

POINT SIX

The Constitution of the United States contains these mandates: Fifth Amendment — "nor shall private property be taken for public use, without just compensation"; Fourteenth Amendment — "nor shall any state deprive any person of life, liberty, or property, without due process of law". The Texas Constitution commands: Section 17, Article I — "No person's property shall be taken . . . without adequate compensation being made"; Section 19, Article I — "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities . . . except by the due course of the law of the land." The Court erred in holding that these mandates were satisfied by the State (through the County) making a good faith effort to purchase the Pope's property at the State's approved market value before instituting condemnation proceedings, and that such constitutional provisions impose no further duty on the State at the trial to deal fairly with the Popes and the Court, by disclosing, and presenting evidence of, the State's approved market value.

5. Grounds in Motion for Rehearing on Application for Writ of Error

This Motion urged and restated as grounds for rehearing, Points One, Two, Three, Four, and Six of the Application for Writ of Error as quoted above.



SUPREME COURT, U. S.

AUG 16 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-2052

W. KENNETH POPE, ET UX,
Petitioners

v.

THE STATE OF TEXAS, ET AL,
Respondents

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

JOE RESWEBER
County Attorney
Harris County, Texas
EDWARD J. LANDRY
Senior Assistant County Attorney
CHARLES J. WILSON
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
228-8311, Extension 151
Harris County, Texas
Attorneys For Respondent,

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
Statement of the Case	1
Delay Between Filing and Trial of the Case	2
Consequence of Delay	3
The "Unavailability" of Bearden	5
Evidence at Trial	6
The Bearden Appraisal, the Offer and the Verdict	7
Arguments and Authorities	8
Argument I, (In Answer to Petitioners' Questions 2 and 3) Public Policy and Due Process do not Require a Condemnor to Produce Evidence of its Highest Appraisal, or of its Final Offer Before Condemnation	8
Argument II, (In Answer to Petitioners' Question 1) There was no Suppression of Evidence in the Trial of this Case	11
Conclusion	13
Certificate of Service	14
Appendix	15
1. Respondents' Original Petition in the Trial Court	15
2. Preliminary Award of Special Commissioners	20
3. Petitioners' Objection to the Award of the Special Commissioners	22
4. Judgment of the Trial Court	26
5. Excerpts from "Preliminary Fact Statement" in "Respondents' Answer to Petitioners' Application for Writ of Error" Filed in the Supreme Court of Texas	33
6. Excerpt from Testimony of Charles J. Wilson, Respondents' Counsel, at Motion for New Trial	37
7. Excerpt from the Testimony of V. P. Ringer at Trial. Questions by Mr. Burns	40

AUTHORITIES

FEDERAL CASES

	Page
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194	12
Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763	12
La Costa v. Department of Conservation of Louisiana, 263 U.S. 545, 44 S.Ct. 186	10
Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505	10
Sinnon v. Craft, 182 U.S. 427, 21 S.Ct. 836	10

STATE CASES

City of Teague v. Stiles, 263 S.W.2d 623 (Tex. Civ. App. 1953 ref. n.r.e.)	8
Denton County v. Brammer, Tex. Sup. 361 S.W.2d 198 (1962)	2
State v. Biggers, Tex. Sup. 360 S.W.2d 516 (1962)	4
State v. Jackson, Tex. Sup. 388 S.W.2d 942 (1965)	2
Lapsley v. State, 405 S.W.2d 406 (Tex. Civ. App. 1966, ref. n.r.e.)	7, 8

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-2052

W. KENNETH POPE, ET UX,
Petitioners

v.

THE STATE OF TEXAS, ET AL,
Respondents

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondents, State of Texas, and the County of Harris, Texas, pray that Petitioners' application for Writ of Certiorari be denied. To demonstrate that Certiorari should be denied, Respondents would show the following:

STATEMENT OF THE CASE

In this case the State of Texas and the County of Harris, Texas, exercised their power of eminent domain to acquire 4.2122 acres of Petitioners' land. The land was condemned for highway purposes.

DELAY BETWEEN FILING AND TRIAL OF THE CASE

The proceeding was initiated on January 13, 1959, (Appendix p. 19) but the case did not come to trial until March 20, 1972, (Appendix p. 26). This long delay is primarily the fault of Petitioners, first, because it was Petitioners who contested the preliminary or administrative award by Special Commissioners (Appendix p. 23) and second, because Petitioners withdrew this preliminary award on May 10, 1959, (Appendix p. 30). Under applicable State law this withdrawal of money—advanced as compensation for the land—operated to eliminate all issues in the case other than the issue of value, i.e., the issue of how much compensation Petitioners should ultimately be paid. *State v. Jackson,* Tex. Sup. 388 S.W.2d 942 (1965). Under applicable State law, the Petitioners therefore had the burden of proof *and the responsibility to go forward with their case. Denton County v. Brammer,* Tex. Sup. 361 S.W.2d 198 (1962).

Petitioners attempt to explain this long delay by an allegation of ". . . extended title litigation . . ." (Petition p. 5). Additionally, the opinion below alludes to ". . . protracted trial in a trespass to try title action. . . ."* (Petition P. A-5) However, the record that was before the State Court of Civil Appeals was, in fact, silent as to how long the question of title was in litigation. The Judgment of the Trial Court—in explaining the dismissal of an intervening claimant—describes the title litigation. (Appendix p. 28), but is silent as to its duration. The reference by the Court below, to a ". . . protracted trial in a trespass to try title action . . ." was induced by a statement of Petitioners in the course of oral argument.

---

* Trespass to try title is the Texas form of action corresponding to the Common Law form of action of Ejectment.

In Respondents' Answer to Petitioners' Application for Writ of Error in the Supreme Court of Texas (Appendix p. 35), Respondents, by reference to a reported Appellate opinion in the title litigation, demonstrate that the title litigation in fact did not explain or justify the thirteen (13) year delay between the filing and the trial of this case.

CONSEQUENCE OF DELAY

The crux of Petitioners' complaint is that the State did not present that *opinion* evidence *most favorable to Petitioners.*

The record is undisputed that the Attorney for the Respondents sought to use the *opinion* testimony of Mr. Thomas Bearden, but found him "unavailable to testify." (Appendix p. 37). Petitioners complain that Bearden's testimony was "suppressed." At the motion for new trial, Respondents offered a full explanation as to why Mr. Bearden was "unavailable to testify," but Petitioners objected to the explanation as "hearsay" and the objection was sustained. (Appendix p. 38). Petitioners might then have subpoenaed Bearden to the motion for new trial to question him as to his "availability" to testify in 1972, but instead they elected to rest on the explanation—which due to their own objection—remained incomplete.

While Mr. Bearden was found to be "unavailable to testify" when Petitioners finally brought this matter to trial, he had testified before the Special Commissioners on January 30, 1959. (Appendix pp. 37-38). Petitioners cannot legitimately complain that they did not know of the Bearden appraisal, because in fact they did hear him testify at the Commisisoners' hearing, and in fact reveal considerable prior knowledge of Mr. Bearden's appraisal in their Amended Motion for New Trial (Petition p.

A-15). This motion was, of course, filed in advance of the hearing on motion for new trial, and reveals the extent to which Petitioners were knowledgeable about the Bearden appraisal prior to hearing on motion for new trial. Thus it may not be suggested that Petitioners first learned of the Bearden appraisal at the hearing on motion for new trial.

Under the then applicable State law,* Petitioners could have subpoenaed Bearden as a witness. *State v. Biggers,* Tex. Sup. 360 S.W.2d 516. Had they done so, they would have been precluded *initially* from revealing that Bearden had appraised the property for the State, however, under *State v. Biggers,* had Respondents' counsel in any way impeached Bearden, or attacked his credibility, then Petitioners would have been permitted to reveal that Bearden had appraised the property for the State.

Thus Petitioners were aware of the Bearden appraisal and could have produced Bearden's testimony—under subpoena—at their own election. The Bearden appraisal was not suppressed.

As Bearden did testify against Petitioners at the Special Commisisoners' hearing on January 30, 1959, it cannot be contested that Petitioners did know about his appraisal well before trial. Additionally, it is clear that Bearden was "available" to testify in 1959, and would, in all probability, have been "available" to testify for a reasonable time thereafter. As the undisputed evidence reveals that Respondents' counsel first sought to use Bearden as a value witness, and only used Finley on Bearden's representation that he was "unavailable to testify" (Ap-

* The State law has since been revised by revision of the State discovery procedure, Rules 167, 168 and 186a, Texas Rules of Civil Procedure.

pendix pp. 37-39), it is clear that it was Petitioners' own neglect and delay that caused the Respondents to be unable to use the evidence which Petitioners now claim to have been "suppressed."

THE "UNAVAILABILITY" OF BEARDEN

The Petitioners have challenged the question of Bearden's "availability" by arguing that the record reveals he was alive, in business and could have been subpoenaed. Thus, argue Petitioners, he was "available." As noted above, Petitioners too were fully aware of Bearden's appraisal, and they too could have subpoenaed him. The question of Bearden's "availability" by subpoena is not the issue. As noted, Respondents offered a full explanation as to why Bearden was "unavailable to testify," and such explanation was blocked by Petitioners' objection.

The point is that over thirteen years had elapsed since Bearden made the appraisal. He had been retained in 1958 to make an appraisal and to testify as an expert witness. He had—in 1959—testified as an expert witness at the Administrative, or Commissioners' hearing. Thus he had fulfilled his original obligation. While Petitioners by their objection suppressed the full explanation, it may be readily recognized that much can happen in thirteen years. The question is one of Bearden's "availability" thirteen years after doing his appraisal to serve *willingly* as an *expert witness*. For this purpose he was "unavailable," and evidence as to his "unavailability" remains undisputed. The Transcript of Testimony in the Trial Court exceeds 500 pages. Most of this testimony was the testimony of *only* two expert appraisers on direct and cross examination.

To properly prepare for such testimony, both sides obviously expended time in consultation with the wit-

nesses. The witnesses themselves each spent many hours in reviewing their files, studying exhibits and notes, and consulting with counsel in preparation to testify. Each testified extensively and each underwent grueling cross examination. In this context, Bearden—thirteen years after he had made his report and first testified—was not *willingly* "available" to serve as expert witness.

The question is whether or not Respondents' counsel committed a wrong in electing not to call an *unwilling* expert who could only be produced by *subpoena.* Since Bearden's only availability *was by subpoena,* the question arises, can Petitioners complain when they likewise were aware of his appraisal, and they likewise elected not to call him *under subpoena.*

THE EVIDENCE AND TRIAL

At trial of this case, Petitioners called a single expert witness on the issue of value. The witness was V. P. Ringer, who testified that in his opinion the highest and best use of the land was for *Apartment* use (Appendix p. 40). Ringer testified that in his opinion the market value of the land was $220,108.11, or $1.20 per square foot. (Appendix p. 35). Ringer's status as an expert and his qualification to express an opinion of the market value of the land *was not challenged.*

After Ringer had testified Respondents called a single expert value witness, H. F. Finley. Finley differed with Ringer as to the highest and best use of the land, and concluded that its highest and best use was for *residential purposes.* The record reveals that only a limited number of single family units could be placed on the land, and reveals the going price for homes on the surrounding land at the time. (Appendix p. 35). This information tends to support the lower Finley opinion in the same manner

that the suggestion of higher density development tends to support the higher Ringer opinion.

Finley's status as an expert and his qualification to express an opinion as to the value of the land was *unchallenged.* (Appendix p. 36).

After the evidence closed, the case was submitted to the jury, which returned a verdict of $155,960.00. (Appendix p. 28).

THE BEARDEN APPRAISAL, THE OFFER AND THE VERDICT

Applicable State law mandates that the Respondents could not condemn Petitioners' land without first seeking, *in good faith,* to purchase. *Lapsley v. State,* 405 S.W.2d 406 (Tex. Civ. App. 1966, ref. n.r.e.). It was in preparation for such a good faith effort that the Bearden appraisal was prepared. (Petition p. 7). The Bearden appraisal estimated the value of Petitioners' land at $146,800.00, and in the course of negotiations, Petitioners were *offered* and *refused* this full amount. (Petition p. A-4). Petitioners have never questioned the fact that Respondents—prior to condemnation—acted in good faith in the effort to secure the right of way and, in fact, Respondents based their offer on their *highest* appraisal. (Petition p. A-4).

As noted, the Verdict was $155,960.00, and the Judgment below mandates that Petitioners be paid the full amount of the Verdict (Appendix p. 30). Thus Petitioners are compensated in an amount of $9,160.00 over the Respondents' offer, and in this sense have "won" in the State Courts.

The essence of Petitioners complaint is that they did not win big enough. Thus, they seek a second trial.

ARGUMENTS AND AUTHORITIES

ARGUMENT I (In Answer to Petitioners' Questions 2 and 3), PUBLIC POLICY AND DUE PROCESS DO NOT REQUIRE A CONDEMNOR TO PRODUCE EVIDENCE OF ITS HIGHEST APPRAISAL, OR OF ITS FINAL OFFER BEFORE CONDEMNATION.

Under Texas law, Respondents were required to negotiate with Petitioners to purchase their land as a prerequisite to condemnation. Additionally, the State law required that the negotiations be conducted in good faith. *City of Teague v. Stiles*, 263 S.W.2d 623 (Tex. Civ. App. 1953 ref. n.r.e.), *Lapsley v. State*, 405 S.W.2d 406 (Tex. Civ. App. 1966, ref. n.r.e.).

The Respondents' good faith in negotiations has never been questioned. Indeed, Respondents offered Petitioners the highest of the two amounts reported in the two appraisals prepared for purposes of negotiation (Petition p. A-4).

Petitioners argue that in addition to the State requirement of good faith negotiation—as a prerequisite to the right to condemn—due process dictates that a Condemnor *must* submit evidence—in trial of a condemnation case—at least as high as the highest appraisal developed for purposes of negotiations, and/or as high as the highest offer made in the effort to negotiate a purchase prior to condemnation.

Sound public policy mitigates against such a rule. The State requirement of *good faith* negotiation prior to condemnation serves the ends of due process, and serves to minimize litigation. Good faith effort to purchase serves to assure that more land owners will receive offers they

can accept, and thereby relieve them of the cost, delay and burden of litigation.

The rule proposed by Petitioners—if held to be law—would serve to defeat this worthy goal. First, it may be readily recognized that when condemnors *must* negotiate in good faith, they will be *induced* to secure reasonable appraisals in preparation to negotiate. Reasonable appraisals will assure that land owners receive fair, or good faith offers. Only when such good faith efforts fail may the condemnor resort to forced purchase by exercise of the power to condemn.

Indeed, a condemnor, when required to make a good faith offer as a prerequisite to condemnation, will often be induced to make an offer somewhat more than what it considers to be its best estimate of market value. This is so because the cost and delays of litigation may offset reasonable additions in voluntary compensation necessary to secure an immediate voluntary purchase.

Petitioners' proposed rule would destroy the incentive of both condemnors and condemnees to act in good faith. Condemnees, knowing that the condemnors would have to produce evidence at trial, at least as high as the best offer, would be motivated to negotiate the best offer and then reject it. The condemnor would then be required to produce evidence on trial of the condemnation consistent with the rejected highest offer. Such evidence would tend to establish a level under which the compensation established in adjudication of value would seldom dip. Thus the condemnee would know that by forcing litigation, he could always get more than the best offer made in negotiations.

The condemnors, anticipating the effect of the rule, would contrive to mitigate its effect. Incentive would

exist to use appraisers of questionable ethics who would appraise consistently low. Negotiations by the condemnor would exist in form only and would consist of ceremonial offers calculated intentionally low to assure that compensation established in litigation would not exceed a reasonable cost.

The result would be that knowledgeable land owners would force condemnation in all cases, after negotiating the highest possible offer, while the less sophisticated land owners would be denied the benefit of a good faith offer based on a reasonable appraisal. It would be the unsophisticated owners unwilling or unable to "fight city hall" who would be victimized.

The public policy which supports the rule of evidence against the admissibility of offers to compromise mitigates equally against the rule urged by Petitioners.

Due process requires that substantial justice be done. *Simon v. Craft,* 182 U.S. 427, 21 S.Ct. 836. Its basic components are notice, hearing and a reasonable procedure, conducted reasonably, *Nebbia v. New York,* 291 U.S. 502, 54 S.Ct. 505; *La Costa v. Department of Conservation of Louisiana,* 263 U.S. 545, 44 S.Ct. 186.

In this case, Petitioners were afforded due process of law. First, they were offered a sum equal to the Respondents' *highest* appraisal. Being dissatisfied, they rejected the offer. Second, they were afforded hearing before three disinterested freeholders acting as Special Commissioners. (Appendix p. 15). At hearing before the Special Commissioners, Respondents produced the testimony of their highest appraiser. The Special Commisisoners awarded Petitioners a sum of money which they withdrew on May 10, 1959 (Appendix p. . .). They have had the use of this money since. Being dissatisfied with the sum

awarded by the Special Commissioners, Petitioners appealed to the Trial Court. Third, after waiting thirteen years, Petitioners brought their claim against Respondents to trial. Because of this long delay, Respondents might have disposed of the matter without trial. *Denton County v. Brammer,* Tex. Sup. 361 S.W.2d 198 (1962). However, no such effort to avoid trial was made by Respondents, and Petitioners received a trial before a Court and Jury. In preparation for trial, Respondents sought the services of their *highest* appraiser to again testify, but found that due to Petitioners' long delay, he was no longer willingly "available." At trial—which lasted four days (Appendix p. 30)—over 500 pages of appraisal testimony was developed on the question of the value of Petitioners' land. After hearing the evidence, a Jury returned a verdict which exceeded Respondents' highest appraisal by $9,160.00.

Petitioners' only complaint is that Respondents did not subpoena the "unavailable" highest appraiser. Yet Petitioners were fully aware of his appraisal, and could have subpoenaed him to trial had they seen fit to do so. *State v. Biggers,* Tex. Sup. 360 S.W.2d 516 (1962).

Clearly, Petitioners were afforded due process of law.

ARGUMENT II (In Answer to Petitioners' Question 1), THERE WAS NO SUPPRESSION OF EVIDENCE IN THE TRIAL OF THIS CASE.

As noted above in the statement of the case, the evidence in this matter is undisputed that Respondents sought to use Bearden as an expert value witness even though his appraisal was considerably higher than that of Finley. Additionally, it has been noted that in preparation for trial of this case, Finley was the only appraiser found who

was willing to serve as an expert witness. This too is undisputed. While there was an appraisal lower than Bearden and higher than Finley, by one Winstead, its existence was unknown to Respondents' counsel until hearing on the motion for new trial. The record is therefore silent on whether Winstead would have been "available to testify."

The important point is that Respondents stood willing to use their highest available appraiser at trial, had he been available to assist in trial preparation, and to testify. In fact he was not. Had Petitioners not delayed for thirteen years before bringing the case to trial, he might have been "available."

Additionally, Petitioners were fully aware of Respondents' highest appraiser and they, like Respondents, could have compelled his testimony by subpoena. This they elected not to do. Thus there was no suppression of evidence.

Petitioners, in their argument that Respondents suppressed evidence, rely on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763.

An examination of *Brady* and *Giglio* reveal that each case is clearly distinguishable. In *Brady*, a criminal case, Defendant's counsel *requested* that the prosecution allow him to examine extrajudicial statements by the Defendant's Co-Principal to the crime of murder. A statement by the Co-Principal was withheld. This Court held that when the prosecution suppresses evidence favorable to the accused *upon request*, such suppression violates due process.

In this case, Petitioners did not *request* a disclosure of Respondents' evidence. Additionally, they were aware of the evidence they allege to have been suppressed, and elected not to make use of it. Thus the cases are not alike.

In *Giglio,* also a criminal case, the Defendant's unindicted Co-Conspirator testified that he had *not* been offered immunity to testify when, in fact, *immunity had been promised.* Thus evidence was not only suppressed, but the government condoned perjury to affect the suppression. Here again the cases are not alike. No agent of Respondents sought to conceal evidence from Petitioners, much less condone or suborne perjury to accomplish the concealment.

In this case, Respondents used that evidence known to counsel, that was still available after Petitioners delayed trial for an excessively long period of time.

Such does not support a conclusion that evidence was suppressed.

CONCLUSIONS

Petitioners urge a rule which would compel a condemnor to provide evidence at trial at least as high as its highest offer and/or its highest appraisal. Such a rule would serve to discourage good faith negotiating between potential condemnors and condemnees. Thus the rule would defeat rather than promote the legitimate ends of due process, and would cause rather than avoid litigation.

Due process requires that Petitioners be afforded notice, hearing and a reasonable procedure. Petitioners had notice and were afforded two hearings including full trial before a jury. In the process, they profited by a verdict of $9,-160.00 over the Condemnor's highest appraisal.

Their only complaint is failure of Respondents to subpoena an unwilling expert witness about whom they were fully aware, and who they could have called. Thus no evidence was suppressed, and Petitioners were fully afforded due process of law.

For all of these reasons, Petitioners' Application for Writ of Certiorari to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas should be denied.

Respectfully submitted,

JOE RESWEBER
County Attorney
Harris County, Texas

EDWARD J. LANDRY
Senior Assistant County Attorney

By _____
CHARLES J. WILSON
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
228-8311, Extension 151

CERTIFICATE OF SERVICE

I, CHARLES J. WILSON, Assistant County Attorney, and Attorney of Record for Respondent, State of Texas, and the County of Harris, in the above cause, hereby certify that on this day I mailed three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Robert L. Burns, of the firm of Sears and Burns, Attorneys at Law, Suite 823, Two Houston Center, Houston, Texas 77002, with sufficient postage to assure delivery. I further certify that all persons entitled to Notice have been notified.

DATED this 14 day of August, 1974.

_____
CHARLES J. WILSON

APPENDIX

1. Respondents' Original Petition in the Trial Court.

NO. 93,317

IN THE
COUNTY COURT AT LAW
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS et al.

vs.

W. KENNETH POPE et al.

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME your petitioners, the State of Texas, and the County of Harris, a body corporate and politic under the Laws of the State of Texas, having by law the right of eminent domain and power of condemnation, acting herein by and through its duly elected and qualified Commissioners Court, for and on behalf of the State of Texas, at the request of the State Highway Commission of the State of Texas, hereinafter styled Plaintiffs, complaining herein of:

> W. KENNETH POPE and wife, KATIE S. POPE; CITY OF HOUSTON; HOUSTON INDEPENDENT SCHOOL DISTRICT; and CARL S. SMITH, Harris County Tax Assessor and Collector,

hereinafter styled Defendants, whether one or more, and for cause of action respectfully represent to the Court as follows:

I.

The State Highway Commission of the State of Texas has laid out and determined that there exists a necessity for, and has requested the Commissioners Court of Harris County, Texas, to acquire by condemnation or otherwise the hereinafter described land for State Highway purposes; the plans and specifications for the right of way and construction of said Highway have been furnished to the Commissioners Court of Harris County, Texas; and it has been authorized and directed to acquire, by condemnation or otherwise, the said right of way for such purpose; and the said Highway Commission has, in the exercise of the powers and duties conferred upon it, determined that there exists a necessity for such Highway; and that the right of way sought herein is likewise necessary and convenient for the course of said State Highway; that said Highway, when constructed, will become an integral part of the State Highway System of the State of Texas, being State Highway No. U. S. 59, County Road No. 17830-2, also known as Southwest Freeway; which right of way herein sought to be condemned forms a part of a tract of land owned by the Defendants in Harris County, Texas, more particularly described as follows:

[Field Notes Omitted]

II.

Plaintiffs are acting under and by virtue of the authority of Articles 3264 to 3271, inclusive, and Article 6674n of the Revised Civil Statutes of the State of Texas, 1925, the consent of the governing body of the City of Houston having been obtained as provided in said Article 6674n.

III.

Plaintiff Harris County and Defendant have been unable to agree upon the sum to be paid for the purchase of said tract of land.

IV.

Plaintiffs are informed and believe, and so allege, that the Defendants hereinbefore named are the record owners of said property; or are holding or claiming some interest in or title to said property; and if Plaintiffs are in error as to the ownership of said property, or as to the extent of title or interest of the hereinbefore named Defendants in and to the property hereinbefore described, Plaintiffs reserve the right to add the name or names of such additional owner or owners, or claimant or claimants, whose interest may subsequently appear; and to condemn the interest of each of such other parties as may subsequently appear, in order to acquire the title in this proceeding for public road purposes, as provided by law.

V.

The State Highway Commission of the State of Texas having heretofore declared the necessity and public convenience by its order to acquire such land for the purpose aforesaid, the Commissioners Court of Harris County, Texas passed orders declaring such fact, and authorizing and directing the filing of this condemnation suit by the undersigned County Attorney of the County of Harris, for and in behalf of the State Highway Commission of the State of Texas.

WHEREFORE, premises considered, Plaintiffs pray that Special Commissioners be appointed as required by

law; that the Special Commissioners so appointed set a date for the hearing; that Defendants be notified of the date of such hearing; that at said hearing, the Special Commissioners assess the value of the property and land belonging to the Defendants which is sought to be condemned, and assess damages, if there be any, that would be occasioned to the remainder of the Defendants' land by acquisition and use, as aforesaid; that Plaintiffs have a decree of condemnation vesting all right, title and interest of the Defendants in and to the property hereinbefore described in the State of Texas for right-of-way purposes for a State Highway, public road, superhighway and freeway; and that upon payment into the Registry of the Court of the amount awarded the Defendants by the Special Commissioners herein appointed, the Plaintiffs have a writ of possession issued in their behalf; all as provided by law; for costs of court; and for such other and further relief, both general and special, as Plaintiffs may be entitled to receive.

/s/ JOE RESWEBER
Joe Resweber
County Attorney
Harris County, Texas

/s/ W. R. ELLIS
W. R. Ellis
Assistant County Attorney
Harris County, Texas

NO. 93,317

IN THE COUNTY COURT AT LAW
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS et al, Plaintiffs

vs.

W. KENNETH POPE et al, Defendants

PLAINTIFFS' ORIGINAL PETITION

Filed on January 13th 1959
at 9:05 A.M.

/s/ MADISON RAYBURN
Judge

---

2. Preliminary Award of Special Commissioners.

NO. 93,317

IN THE
COUNTY COURT AT LAW
OF HARRIS COUNTY TEXAS

THE STATE OF TEXAS et al.
COUNTY OF HARRIS, Plaintiff

vs.

W. KENNETH POPE et al., Defendant

AWARD OF COMMISSIONERS

On this, the 30th day of January, 1959, came on to be considered the above matter, before the undersigned,

CLAXTON PARKS, RUSSELL L. MILLER and JOHN V. SINGLETON,

Special Commissioners and freeholders of Harris County, Texas, duly appointed by the Honorable Judge of the County Court at Law of Harris County, Texas, upon the application of the County of Harris, a body corporate and politic, said petition for condemnation having been filed on the 13th day of January, 1959, in the County Court at Law of Harris County, Texas, praying for the condemnation of a certain strip of land required for a right of way over the lands and premises of

W. KENNETH POPE and wife, KATIE S. POPE; CITY OF HOUSTON; HOUSTON INDEPENDENT SCHOOL DISTRICT; and CARL S. SMITH, Harris County Tax Assessor and Collector;

said right of way for which application to condemn was filed being for the purposes of opening, widening, draining, and grading and constructing a portion of State Highway No. U. S. 59, Southwest Freeway, County Road No. 17830-2, in the County of Harris and State of Texas; said land being condemned being more particularly described as follows:

[Field Notes Omitted]

The said Commissioners having given notice, and the said Defendants having been duly and properly served with notice of the time of hearing and the place of meeting, all as required by law; and all parties having appeared in person or by their attorneys, and having announced ready for trial, all matters involved in said condemnation were submitted to the said Special Commissioners; and at the appointed time and place, the pleadings and evidence of all of the parties as to the value of the land taken for right of way purposes, and as to the damages, if there be any, which will be sustained by the Defendants by reason of such condemnation, having been heard by the said Special Commissioners, we find as follows:

For the value of the land taken, the same being hereinbefore more particularly described, at the time of said hearing, the sum of One Hundred Sixty-five Thousand, One Hundred Thirty-four and 70/100 Dollars ($165,-134.70); and we find no damages to the balance of the Defendants' property by reason of such condemnation and taking, being a total sum of One Hundred Sixty-five Thousand, One Hundred Thirty-four and 70/100 Dollars ($165,134.70), awarded herein.

And we, the said Special Commissioners, award the hereinbefore described land and the title thereto to the State of Texas, for right of way purposes, with full and complete right, use and possession thereof; and we hereby adjudge all costs of this proceeding against the Plaintiff.

/s/ CLAXTON PARKS

/s/ JOHN V. SINGLETON

/s/ RUSSELL L. MILLER

3. Petitioners' Objection to the Award of the Special Commissioners.

NO. 93,317

IN THE
COUNTY COURT AT LAW
OF HARRIS COUNTY, TEXAS

STATE OF TEXAS, ET AL

vs.

W. KENNETH POPE, ET AL

OBJECTIONS OF DEFENDANTS
W. KENNETH POPE, ET AL

To The Honorable Judge of Said Court:

The Defendants, W. Kenneth Pope and wife, Katie S. Pope, file these Objections to the Award of the Commissioners:

I

The Award of the Commissioners is grossly insufficient and does not award these Defendants just compensation for their property in that the amount of such award is grossly less than the market value of such property.

II

There is no jurisdiction of the parties of the subject matter as affirmatively appears from the Statement in

Condemnation filed by the State of Texas and the County of Harris, because neither the State of Texas nor the County of Harris has taken the action prescribed by law necessary to authorize Condemnation of the Defendants' property.

III

The Statement in Condemnation filed by the State of Texas and County of Harris affirmatively shows that the petitioners are seeking to acquire a greater interest in the property described than permitted by law in that it does not expressly exclude from the Estate sought to be condemned all the oil, gas and sulphur which can be removed from beneath the land as required by law.

IV

As affirmatively appears from the Statement in Condemnation filed by the State of Texas and the County of Harris, petitioners seek to condemn the land for a "controlled access highway" and have not complied with the mandatory prerequisites prescribed by law to authorize and initiate condemnation proceedings for such purpose, and the action is not brought by a person authorized by law to prosecute the proceedings.

V

Defendants reserve the right to raise any further objections upon the trial hereof, and reserve the right to amend these objections.

WHEREFORE, these Defendants pray that this proceeding be dismissed, and in the alternative, that they

be awarded the market value of the land proposed to be taken, and in any event for all relief for which they may show themselves entitled at law or in equity together with all costs of suit.

HOFHEINZ, SEARS, JAMES
AND BURNS

By ROBERT L. BURNS
Robert L. Burns
1107 South Coast Bldg.
Houston 2, Texas
Attorneys for Defendants
W. Kenneth Pope and wife,
Katie S. Pope

4. Judgment of the Trial Court.

NO. 93,317

IN THE
COUNTY CIVIL COURT AT LAW NO. 1
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS, ET AL, Plaintiffs

vs.

W. KENNETH POPE, ET AL, Defendants

JUDGMENT ON VERDICT

BE IT REMEMBERED that on the 20th day of March, 1972, came on to be heard the above entitled and numbered cause wherein the State of Texas and the County of Harris are Plaintiffs; W. Kenneth Pope, his wife, Katie Pope, Carl Smith, Tax Assessor & Collector of Harris County, Texas; The City of Houston and the Houston Independent School District are Defendants; and wherein Eliza T. Johnson is Intervenor. Be it further remembered that this cause is an action in eminent domain for the condemnation of the land hereinafter described; that Plaintiff has heretofore on March 6, 1959 deposited the amount of the Award of the Special Commissioners in the Registry of the Court, which amount, save and except for $781.26, was withdrawn from the Court Registry by W. Kenneth Pope et ux, the said sum of $781.26 having been left in the Registry of the Court to secure the claim of the City of Houston and Houston Independent School District for taxes. That because Defendants withdrew the Award of the Commissioners from the Registry of the Court before the commencement of

trial, the only issue before the Court on trial hereof was the issue of the market value of the land condemned, and the issue of whether or not, and to what extent the Defendants' remaining land was damaged. Be it further remembered that in open Court and before commencement of trial, Defendants W. Kenneth Pope et ux admitted that they suffered no damage to their remaining land, for which reason the only remaining issue before the Court was the issue of the market value of the land condemned. Further, be it remembered that the parties stipulated in open Court that the date on which Plaintiffs deposited the amount of the Commissioners Award was March 6, 1959, and therefore the only issue to be tried was the market value of the land condemned on March 6, 1959.

The parties plaintiff and defendant having appeared in open Court and announced ready for trial, and the parties plaintiff and defendant having submitted to the Court evidence in the form of certified copies of Judgments in the District Court that Intervenor Eliza T. Johnson has no interest in this cause, the Court directed that the trial should proceed.

And came a Jury of six good and lawful men and women, being duly impaneled and sworn, and the Jury having heard opening statements by counsel for the parties and the evidence for both plaintiffs and defendants, the matter was submitted to the Jury in connection with the charge of the Court on Special Issues on March 24, 1972, as follows:

"SPECIAL ISSUE NO. 1

"From a preponderance of the evidence, what do you find was the Market Value on March 6, 1959

on the 183,483 square feet of land belonging to W. Kenneth and Kate Pope and condemned by the State of Texas and County of Harris?

"Answer in dollars and cents."

And the Jury having heard the arguments of counsel and having retired to consider its verdict, after due deliberation, on the 24th day of March, 1972, return into open court its verdict and answers, to-wit:

"ANSWER: $155,960.00.

"We the Jury, have answered the above and foregoing Special Issue as herein indicated and herewith return same into Court as our verdict.

/S/ WAYNE K. GEIVER, FOREMAN."

And Eliza T. Johnson having intervened herein, claiming title to the subject land and the proceeds of condemnation for the said land adverse to Defendants W. Kenneth Pope and wife, Katie Pope, and the 80th District Court of Harris County, Texas, in Cause No. 576,461, having adjudicated title to the land in question to be in W. Kenneth Pope and wife, Katie Pope, as against certain persons claiming under Eliza T. Johnson, and the 151st District Court of Harris County, Texas, in Cause No. 668,238, having further adjudicated title to the subject land to be in W. Kenneth Pope and wife, Katie Pope, as against other persons claiming under Eliza T. Johnson, and the Court finding that the 80th District Court and the 151st District Courts are courts of competent jurisdiction to adjudicate title to real property, located in Harris County, Texas, and the property made the subject of this cause being located in Harris County, Texas, the Court is of the opinion that Eliza T. Johnson has no interest

in the subject property or in the proceeds of this action in eminent domain, and the Intervenor Eliza T. Johnson should be dismissed from this action, and that her pleading in intervention should be stricken from this proceeding.

And Carl S. Smith, in his capacity as Tax Assessor and Collector of Harris County, Texas, having intervened in this matter for taxes due the State of Texas and the County of Harris, which taxes have since been paid, he should be dismissed from this cause and take nothing by this Judgment.

And the City of Houston and Houston Independent School District having heretofore intervened in this cause for taxes, which taxes have been paid, the said City and School District should be dismissed from this cause, and they should take nothing by this Judgment.

And said verdict and answer of the Jury having been received in open court, and having been filed, and the jury having been discharged, and the Court being of the opinion that under the evidence and under the answers of the Jury to the Special Issue above set out, Plaintiff, State of Texas, is entitled to a Judgment for title to the hereinafter described land; and the Court being further of the opinion that Defendants, W. Kenneth Pope and wife, Katie Pope, are entitled to recover from Plaintiffs, as compensation for the taking of the said land, the value of said land, being the sum of ONE HUNDRED FIFTY-FIVE THOUSAND NINE HUNDRED SIXTY DOLLARS ($155,960.00), in full and complete settlement, satisfaction and discharge of the liability of Plaintiffs to said Defendants by reason of this condemnation and taking of the land hereinafter described, and the said Defendants owning the remainder of said land, consisting

of two acres, more or less, to the south of the land condemned, for which no damages have been claimed, the Court is of the opinion that said Defendants should recover no additional sum as damages to their remaining land, and that the total sum to which Defendants are entitled as compensation for the condemnation of their land and its severance from their remaining land is the sum of ONE HUNDRED FIFTY-FIVE THOUSAND NINE HUNDRED SIXTY DOLLARS ($155,960.00), the market value of the land condemned;

And the Court further finding, as reflected by the papers on file herein, that on January 30, 1959, the Special Commissioners heretofore appointed by the Court awarded Defendants the sum of One Hundred Sixty-Five Thousand One Hundred Thirty-Four and 70/100 Dollars ($165,134.70) as compensation for the land taken, which amount was contested and objected to by Defendants, and that further, on May 10, 1959, Defendants W. Kenneth Pope and wife, Katie Pope, withdrew from the Registry of the Court the sum of One Hundred Sixty-Four Thousand Three Hundred Fifty-Three and 44/100 Dollars ($164,353.44), leaving in the Registry of the Court the sum of $781.26 to secure the claim for taxes by the City of Houston and the Houston Independent School District, which sum of $781.26 remains and is still in the Registry of the Court.

And the sum of $165,134.70, awarded by the Special Commissioners exceeds the amount due the Defendants in the amount of $9,174.70, which amount Plaintiff, County of Harris, is entitled to recover. And the Court further finding that the sum of $781.26 was left in the Registry of the Court as security for the payment of taxes due and owing to the City of Houston and the

Houston Independent School District, which taxes have since been paid, the Court is of the opinion that the Plaintiff, County of Harris, is entitled to recover from the Registry of the Court the sum of $781.26. Upon recovering the sum of $781.26 from the Registry of the Court, the Court finds that Plaintiff, County of Harris, is entitled to recover over and against Defendants, W. Kenneth Pope and wife, Katie Pope, the further and additional sum of Eight Thousand Three Hundred Ninety-Three and 44/100 Dollars ($8,393.44) with interest at the legal rate from the date of Judgment.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff State of Texas do have and recover of and from the Defendants, W. Kenneth Pope and wife, Katie Pope, all right, title and interest in and to the following described land, to-wit:

[Field Notes Omitted]

It is further ORDERED, ADJUDGED AND DECREED that Plaintiff County of Harris have Judgment over and against Defendants, W. Kenneth Pope and wife, Katie Pope, in the amount of EIGHT THOUSAND THREE HUNDRED NINETY-THREE AND 44/100 DOLLARS ($8,393.44), with interest at the legal rate of 6% from the date of this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that the Intervention of Eliza T. Johnson on file herein be, and it is, stricken from the pleadings of this cause, and it is ORDERED that Eliza T. Johnson and those claiming under her take nothing by this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that Defendant Carl S. Smith, Tax Assessor and Collector in and for Harris County and the State of Texas, is dismissed from this cause, and it is ORDERED that he take nothing by this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that the City of Houston and the Houston Independent School District are dismissed from this cause, and it is ORDERED that they take nothing by this Judgment.

It is further ORDERED, ADJUDGED AND DECREED that the Clerk be, and he is Ordered to pay over to the County of Harris the sum of $781.26, on deposit in the Registry of this Court in this cause, upon the filing of proper receipt.

It is further ORDERED that all cost accrued herein from the time of filing of Defendants' objections herein be, and it is, assessed against the Defendants.

For all of which let execution issue.

ENTERED this 7th day of December, 1972.

/s/ CHARLES C. CASTLES
Judge Presiding

APPROVED:

JOE RESWEBER, County Attorney

By /s/ CHARLES J. WILSON
Charles J. Wilson
Assistant County Attorney

5. Excerpts from "Preliminary Fact Statement" in "Respondents' Answer to Petitioners' Application for Writ of Error" filed in the Supreme Court of Texas.

PRELIMINARY FACT STATEMENT

The facts as related by the Court of Civil Appeals are substantially correct with two exceptions.

First, the opinion explains that the long delay between Petitioners filing objections (February 17, 1959, TR Pp 8-12) and Petitioners bringing the case to trial (March 20, 1972, TR Pp. 37-42) was due to a protracted trial in a Trespass to Try Title. The record on appeal does reflect—in the Trial Court's Judgment—that actions in Trespass to Try Title were involved. However, the record on appeal is silent as to when Trespass to Try Title commenced and ended. During oral argument before the Court of Civil Appeals, Petitioners did represent that delay had been caused by the trespass action, and Petitioners so represent in the Application for Writ of Error, (AWE p. 16). However, when Petitioners requested transcript (TR Pp. 85-86) they did not include in the request any documents which would reflect when the trespass action commenced and ended. The second page of the Trial Court's Judgment (TR Pp. 27-42) reveals that certified copies of the Trespass Judgments were before the Trial Court, and Petitioners could have had these instruments in the record on appeal had they so desired.

Information within the record about the trespass action reveals (1) that Eliza T. Johnson claimed the land adverse to Petitioners and sued Petitioners in Trespass to Try Title. (2) That Eliza T. Johnson was the *only* adverse claimant to intervene in this condemnation action.

(3) That two Judgments, in two trespass actions were entered against persons claiming under Eliza T. Johnson. (4) That, based on the Trespass Judgments, the Trial Court dismissed Eliza T. Johnson as an Intervenor and struck her Petition in Intervention.

It is submitted that since the record is silent as to when the Trespass actions were filed, and as to when they were terminated, it was improper for the Court of Civil Appeals to assume that a thirteen year delay in trial was justified by the Trespass actions.

Additionally, it is submitted that since Eliza T. Johnson was the *only* adverse claimant to intervene in this condemnation, and since other adverse claimants claimed under her, Petitioners were free to proceed to trial when the trespass action by Eliza T. Johnson was adjudicated against her.

Fortunately, there is a means by which this Court can determine the date of termination of the Trespass action by Eliza T. Johnson. *H. H. Farnhart v. W. Kenneth Pope, et ux,* 384 S.W.2d 932 (Tex. Civ. App., 1964), is the Trespass to Try Title—suit filed by Eliza T. Johnson. From this reported opinion it is seen that Eliza Johnson was Plaintiff. During pendency of litigation, Eliza Johnson died and Farnhart, claiming under her as Grantee, was substituted as Plaintiff. In the reported opinion it is revealed that *Eliza Johnson* sued Respondents on August 2, 1961, to recover *six acres out of 42.492 acres in the A. C. Reynolds League, Harris County, Texas.* This action *condemns 4.2122 acres out of two three acre tracts (six acres) in the A. C. Reynolds Survey, Harris County, Texas.* The reported opinion reveals that Plaintiff lost at trial, appealed and trial Court was affirmed. Judgment of

the Court of Civil Appeals was rendered on November 19, 1964, and rehearing was denied on December 10, 1964. Thus this Court may take judicial notice of the opinion in *Farnhart v. Pope*, and see that the long delay in trial of this case was not due to a protracted trial of a Trespass to Try Title.

* * *

As their first and only witness, Petitioners called a real estate appraiser named V. P. Ringer (TSF Pp. 4-262). Ringer testified to personal qualifications sufficient to allow him to express an opinion of real estate value (TSF pp. 4-22). Respondents lodged no objection to Ringer's opinion testimony and Ringer expressed an opinion that the land was worth $220,108.11, or $1.20 per square foot (TSF p. 23).

* * *

After Petitioners rested, Respondents called one value witness, H. F. Finley. Finley testified to facts about his background that would establish that he was qualified to express an opinion as an expert on value of real estate (TSF pp. 280-289). In this regard he testified that he had been in the real estate business since 1947 (TSF p. 280), starting as a broker, later working as a builder (TSF p. 281), but without giving up the brokerage business. In 1952-1953 he became more active as an appraiser (TSF p. 284). He testified that as a broker he has sold all kinds of real estate (TSF p. 285), that he is a member of the American Society of Appraisers (TSF p. 286) and is past president of the Houston Chapter (TSF p. 288).

Finley testified that he was familiar with the subject property, as it was in 1959, before condemnation, and that he had appraised it for the Harris County Right of

Way Department (TSF pp. 289-290). *Petitioners did not object to Finley's qualifications as an expert,* and Finley testified that in his opinion the highest and best use of the subject property at the time of condemnation in light of surrounding conditions, *would have been residential.* Finley's opinion that the land was best suited for residential use explains his opinion that the land had a relatively low value ($75,000.00) in relation to Ringer and to other appraisers the State might use. By referring to any of the four aerial photographs in the record, it can be seen that the land was surrounded by residential subdivisions. Ringer had testified that the average price of houses on adjoining property ranged from $14,000.00 to $19,000.00 (TSF p. 37). To develop the land residentially, a street would have to be extended through the middle of the property. If lots were then laid out, of the same size as adjacent residential lots, approximately 20 lots could be provided. In view of a $14,000-$19,000 range for finished houses, a price of $75,000.00 for vacant land out of which a street would have to be provided, and out of which approximately 20 lots could be surveyed, does not seem outrageous.

Finley testified that by use of the "market approach" he formed an opinion of the value of the subject property, and that in his opinion it had a value of $75,000.00, or $17,500.00 per acre or $.40 per square foot on March 6, 1959, the date of taking. (TSF p. 329).

6. Excerpt from Testimony of Charles J. Wilson, Respondents' Counsel, at Motion for New Trial.

MR. WILSON: I'll try to keep it brief and informal for the record. My name is Charles J. Wilson, and I'm an assistant county attorney in the Harris County Attorney's office and I have been with the county attorney since September of 1962. I have been assigned from time to time to emminent domain cases since about 1966 when Joe Terracina left the county attorney's office and numerous cases were reassigned from him to me and at that time I became or started to become familiar with the activity in the trial of emminent domain cases.

In the latter part of 1970, Mr. Charles F. Mitchell, who had been with the county attorney's office for a number of years, announced his retirement and retired during the first of November of 1970. At that time, he was assigned to the case, State of Texas, Vs. W. Kenneth Pope and at that time Mr. Burns, representing the defendant, had the case set for trial and at that time numerous of Mr. Mitchell's files were reassigned to me and one of these cases was the Pope case which was reassigned to me. I immediately upon receiving this file, Your Honor, I reviewed the file that was available to me in the office of the county attorney and I found there had been in the file one appraisal of what we refer to in the business as "base appraisal." By "base appraisal" which is a term we use, we refer to an appraisal and on a given case as many as there may be several but a "base appraisal" is an appraisal prepared prior to the initiation of the condemnation and which was used as a basis of making the offer which was then related to, transmitted to, the county attorney by the right-of-way depart-

ment with a request that we proceed in condemnation and it will be the appraisal used at the commissioners hearing under the procedure as follows in our office.

This appraisal was by Mr. Thomas Bearden and a copy of the letter in the record need not be further elaborated on. There were various orders of commissioners court indicating several other appraisals had been requested to appraise the property and letters indicating that various of these appraisers had not followed through and had for reasons otherwise not turned in the appraisal reports. There was a letter in the file from Mr. Finley indicating that he had appraised the property and setting out his opinion of value. On December the 21st, 1970 I made a call to Mr. Bearden because his seemed to be the only available appraisal and I knew the case was going to have to be tried. I customarily make a written, hand written, memorandum when I talk to somebody on the telephone about important matters on one of these files on the phone and I made such memorandum of my telephone conversation with Mr. Bearden which was dated December the 21st, 1970. Reading from this memorandum dated on that day and written by me on that date I read.

MR. BURNS: I object to anything Mr. Bearden had to say being hearsay. I can't cross examine him and let him without objection testify to this which was indicated by the file as to commissioners mentioned. I do object to this.

THE COURT: All right, sustained at this time as to hearsay.

MR. WILSON: Your Honor, I would offer an explanation as to what—I'll say this much, I found that Mr.

Bearden was not available to testify. Do you want to go into why?

MR. BURNS: I object because this is the conclusion of the witness, Your Honor.

THE COURT: Well, you can take him on cross examination. I'll overrule the objection to testimony that Mr. Bearden was not available to testify subject to your cross examination.

MR. WILSON: Okay. Finding Mr. Bearden was unavailable, I talked to Mr. Finley and Mr. Finley advised me he had completed an appraisal and he had data in his office later when the case was again at the time set for trial, I reviewed the matter with Mr. Finley and he made available the data on which he based his testimony. At that time, he was the only appraiser that I could find available who'd claimed to have appraised the property and who had anything to do with the appraisal back in 1958 about the time of taking. Mr. Finley, was hired by commissioners court on February the 26th, 1959, Your Honor. That's my offer of the explanation as to why Bearden's appraisal was not used in the trial . . ."

* * *

7. Excerpt from the Testimony of V. P. Ringer at trial. Questions by Mr. Burns.

* * *

Q. Mr. Ringer, do you have an opinion as to what was the highest and best use of this property on March the 6th, 1959?

A. My opinion that the highest and best use would be to develop it in multi-unit apartments.

* * *